Supreme Court of the United States

OCTOBER TERM, 1946

No. 1285 73

MARIANNA VON MOLTKE,
Petitioner,

vs.

A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF

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SUBJECT INDEX TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TABLE OF CASES, TEXT BOOKS, CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES

Table of Cases

Constitutional Amendments, Statutes and Rules

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

This is a habeas corpus proceeding. On February 7, 1946 petitioner filed a petition for a writ of habeas corpus in the District Court of the United States for the Eastern District of Michigan, Southern Division (R. 1-7) alleging that she was unlawfully and unjustly imprisoned in the custody of respondent under an order of commitment issued by said court November 15, 1944 (R. 8, 9, 10) on petitioner's plea of guilty to a charge of conspiracy to violate Section 2 of the Espionage Act of 1917 (50 U. S. C. A., Sections 32, 34) pursuant to which petitioner was committed to prison for four years (R. 8, 9). Petitioner alleged that her restraint and imprisonment were illegal and in violation of Amendments V and VI of the Constitution in that

(a) she was neither aware nor properly advised of her right to have the assistance of counsel for her defense, did not understandingly waive the same, and was not properly and effectively afforded the assistance of counsel for her defense in accordance with the intent and purpose of the VIth Amendment, and

(b) she was deprived of her liberty without due process of law in that she was coerced, intimidated and deceived into pleading guilty to a charge of conspiracy to violate the espionage act notwithstanding her belief that she was innocent, contrary to the guarantee of the Vth Amendment (R. 2).

Respondent filed an answer to the petition in the nature of a general denial on information and belief (R. 17-19)

relying principally upon the record of conviction. Writ of habeas corpus was issued March 9, 1946 (R. 16) and a hearing on the issues raised was held in the District Court March 11 and 12, 1946 (R. 47-170). On April 24, 1946 the District Judge before whom the hearing was held filed a written opinion (R. 170-174) denying relief and ordering the petition and writ dismissed. On April 26, 1946 an order was entered in conformity with said opinion (R. 175). From this judgment petitioner appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 175). There the case was argued and submitted on October 23, 1946 (R. 181) and on March 10, 1947 an opinion was handed down affirming the judgment of the District Court, one Judge dissenting (R. 182-198). Judgment was entered accordingly (R. 181).

Petitioner has been in custody since August 24, 1943, the date she was arrested on a presidential warrant as a dangerous enemy alien (R. 48). On October 7, 1943, under circumstances outlined in her petition for writ of habeas corpus (R. 1-7), petitioner signed a "waiver" of her right to be represented by counsel at the trial of her case (R. 36) and pleaded guilty to a charge of conspiracy to violate the espionage act. The indictment containing the charge consisted of 17 mimeographed pages and included 47 overt acts (R. 20-34), five of which (R. 29, 30, 31) name petitioner. Her subsequent attempts to withdraw the guilty plea and obtain a trial were unsuccessful (R. 46) and on November 15, 1944, almost 15 months after her arrest, her motion for leave to withdraw her plea was denied and she was sentenced to imprisonment for a term of four years (R. 8-9). She is still in prison.

BASIS OF JURISDICTION

Jurisdiction of this court is invoked under section 240 of the Judicial Code as amended, being section 347 (a), Title 28, U. S. C. A.

QUESTIONS PRESENTED

1. Under the evidence and proofs in the District Court, did petitioner as a matter of law and fact voluntarily, competently and understandingly waive her right to have the assistance of counsel in her defense as guaranteed by the VIth Amendment?

2. Did the Court of Appeals err in holding that petitioner had voluntarily, competently and understandingly waived her right to assistance of counsel in her defense?

3. Under the undisputed evidence and proofs in this case, was not petitioner coerced, intimidated and deceived into pleading guilty and waiving her right to the assistance of counsel by agents of the Federal Bureau of Investigation and thus deprived of her liberty without due process of law contrary to the provisions of the Vth Amendment?

4. Do the evidence and proofs in this case show compliance by the Government with the requirements of the Vth and VIth Amendments and observance of petitioner's Constitutional rights under said Amendments in connection with her conviction and sentence?

5. Did the Circuit Court of Appeals err in affirming the judgment of the District Court under the undisputed facts in this case?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals has decided important questions of federal law in this case: to-wit, questions involving civil liberties arising under the Vth and VIth Amendments to the Constitution which have not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has decided federal questions arising under the Vth and VIth Amendments to the Constitution in a way probably in conflict with applicable decisions of this Court. *Hawk v. Olson*, 326 U. S. 271; *Glasser v. United States*, 315 U. S. 60; *U. S. v. Adams*, 320 U. S. 220; *Walker v. Johnson*, 312 U. S. 275; *Waley v. Johnston*, 316 U. S. 101; *Williams v. Kaiser*, 323 U. S. 471; *Johnson v. Zerbst*, 304 U. S. 458; *Rice v. Olson*, 324 U. S. 786; *Powell v. Alabama*, 287 U. S. 69.

Wherefore Petitioner prays:

1. That a writ of certiorari issue out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said circuit court of appeals had in the case numbered and entitled on its docket No. 10307, Marianna von Moltke, Appellant v. A. Blake Gillies, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said circuit court of appeals herein may be reversed by this Court and petitioner remanded to the District Court of the United States for the Eastern District of Michigan, Southern Division, for such further proceedings as may there be determined.

2. That pending disposition of this petition and until the final action of this Court, petitioner may be enlarged on recognizance.

3. That petitioner may have such further relief as this Court may deem just and proper.

MARIANNA VON MOLTKE,

By G. LESLIE FIELD,
Attorney for Petitioner,
415 Dime Building,
Detroit 26, Michigan.

Dated April 22, 1947.

Supreme Court of the United States

OCTOBER TERM, 1946

No.....

MARIANNA VON MOLTKE,
Petitioner,

vs.

A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The District Court filed an opinion (R. 170-174) which has not been officially reported.

The opinion of the Circuit Court of Appeals was filed March 10, 1947 (R. 182-197) and has not yet been officially reported.

JURISDICTION

Date of order and judgment of the Circuit Court of Appeals for the Sixth Circuit to be reviewed is March 10, 1947 (R. 181).

Section 240 of the Judicial Code as amended, being section 347 (a), Title 28, U. S. C. A., is believed to sustain the jurisdiction of this Court herein.

STATEMENT OF CASE

(Unless otherwise indicated the following facts are undisputed)

Petitioner, a middle-aged housewife who spoke German at home (R. 70) and had only a limited knowledge of English (R. 69, 71) and no previous experience with legal proceedings of any kind (R. 48) was suddenly arrested by agents of the Federal Bureau of Investigation (hereafter for brevity called F. B. I.) on a presidential warrant as a dangerous enemy alien (R. 48, 49). She was questioned for four days and told that she was not entitled to be represented by counsel (R. 50). About 3 weeks after her arrest she was handed a lengthy indictment charging her with conspiracy to violate the espionage act (R. 20-34) which she read but testified she did not understand (R. 50). She testified that she did not know the meaning of the word "conspiracy" or what she called the "over" acts (R. 50, 69, 85, 87 and note overt acts numbered XXIV, XXIX, XXX, XXXI and XXXII, R. 29-31).

Three days after receiving the indictment, petitioner and another woman defendant were taken to a Federal courtroom where a criminal trial was in progress (R. 51, 52). The District Judge interrupted the trial and requested the attorney acting for the defendant in that case to represent petitioner and the other woman defendant (R. 11, 51, 111).

The attorney was reluctant to act but upon being assured by the Judge that it would be only for the arraignment and would take only a few minutes, consented (R. 51, 111). While both women were seated in the courtroom, the attorney held a hurried, whispered conversation with them. He did not see the indictment, discuss the charges or advise petitioner and the other woman other than to urge them to stand mute (R. 52, 112) which they did though petitioner did not understand the suggested procedure (R. 52). This was the only contact the attorney had with them and the whole proceeding took only a few minutes. Later the same day, the attorney entered a written appearance for both defendants "for arraignment only" (R. 47). Neither petitioner nor her husband had any means to retain or pay counsel (R. 51, 167, 168).

Immediately following the arraignment, the District Judge told petitioner that he would appoint another attorney right away to represent her at the trial (R. 53). No attorney was appointed, however, though petitioner waited for one to appear (R. 57).

Petitioner appealed to F. B. I. agents who visited and questioned her at the jail as to what she should do (R. 96, 121, 122). Two of the agents told her they could not advise her (R. 129, 147) and one of them testified (R. 151):

> "Mrs. von Moltke was endeavoring to get advice or information from me, or opinions, and yet she realized I couldn't give her opinions, but she tried in the best way she could to get some idea."

Agent Collard, who had practiced law in Texas before joining the F. B. I. (R. 140), of which fact petitioner was advised (R. 56), was more accommodating. He spent several hours with petitioner in the matron's office at the jail "explaining" the indictment and attempting to define the

nature of a conspiracy (R. 141, 142). In doing so, he used an illustration from which the petitioner concluded that the mere act of conferring with people who later turned out to be guilty of criminal acts, would also make her guilty (R. 55, 144). After being thus advised, she said to F. B. I. agent Collard (R. 55):

> "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?"

F. B. I. agent Collard then told her that the probation department would collect the proper data and present it to the judge, so that he would "know what to go by" (R. 55).

About this time F. B. I. agent Kirby told petitioner that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case were going to plead guilty (R. 84). Petitioner asked him whether she would be permitted to have a trial if all the other defendants pleaded guilty and he advised her that the answer to that question would be up to the United States Attorney's office (R. 85, 134).

During this time petitioner was told by F. B. I. agents who visited her at the jail that public sentiment was hostile; that the trial would be a public spectacle; that petitioner and the other defendants would have to face a hostile public if they went to trial, but that the F. B. I. agents would protect them (R. 53, 54, 83, 84). Petitioner testified that she asked F. B. I. agent Dunham (R. 82):

> "* * * if we go to court will we be bodily attacked?"

and that he answered:

> "it is war time—you have to bear that in mind. Public sentiment grows from war hysteria. You don't need to be afraid; you will be protected."

Petitioner decided that her case was hopeless and believed she had no alternative but to plead guilty (R. 58, 77, 78). She inquired as to the consequences of pleading guilty, particularly with respect to being deported as she had three American born sons and a husband who was a naturalized American citizen (R. 58, 59, 101). Her husband strongly advised her not to do anything until she had seen a lawyer (R. 60).

Just prior to October 7, 1943, petitioner was told by a fellow woman prisoner that unless petitioner pleaded guilty, her husband would be implicated (R. 54, 61). Greatly disturbed, petitioner asked to see F. B. I. agent Collard and when he arrived told him what she had heard and asked him if it was true. He told her that he could not answer her question (R. 61). Petitioner decided there was some truth in what she had heard and said she was ready to plead guilty. She was immediately taken before another District Judge where, without counsel, she signed a partially illegible mimeographed paper (R. 36) which she testified she did not understand (R. 66, 67) but signed because she was told it was a matter of form (R. 109, 110), and pleaded guilty to the charge in the indictment (R. 35).

During the latter part of December, 1943, following her plea of guilty, petitioner testified that she learned for the first time through an attorney (a) that her plea of guilty was not an irrevocable act, but that it was permissible to withdraw the plea and have a trial and also (b) that in the United States a defendant does not have to prove himself innocent as is the case in European countries, but that it is

the duty of the prosecuting attorney to prove guilt (R. 73). Later this information was partially confirmed to petitioner by F. B. I. agent Dunham (R. 78, 79).

After considerable delay and effort an attorney was appointed by the District Judge for the purpose of making a motion for leave to withdraw petitioner's plea of guilty (R. 37-45). The motion was heard and denied November 15, 1944, without the taking of any testimony or permitting petitioner to take the stand (R. 46, 47) and petitioner was immediately sentenced to four years' imprisonment (R. 8). Thereafter writ of habeas corpus was dismissed after hearing in the District Court (R. 175) which decision was affirmed by the Circuit Court of Appeals, one Judge dissenting (R. 181-198).

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals under the undisputed evidence and proofs herein erred in holding that petitioner freely, competently and understandingly waived her constitutional right to the assistance of counsel in her defense and in affirming the decision of the District Court on that issue.

2. The Circuit Court of Appeals erred in holding under the undisputed evidence and proofs herein that petitioner was not coerced, intimidated and deceived by agents of the F. B. I. into pleading guilty and waiving her right to the assistance of counsel and thus deprived of her liberty without due process of law contrary to the mandate of the Vth Amendment, and in affirming the decision of the District Court on that question.

SUMMARY OF ARGUMENT

Petitioner did not competently and validly waive her constitutional right to assistance of counsel for the following reasons:

(a) In the light of petitioner's background and experience and the complexity of the charges brought against her, petitioner, without the assistance of counsel, was incapable of understanding and properly evaluating the proceeding in which she was involved and intelligently and competently waiving her constitutional right to assistance of counsel;

(b) Petitioner was given conflicting and confusing advice as to her right to be represented by counsel;

(c) Petitioner was misled and confused as to her rights by

(1) Wholly inadequate "assistance" of counsel at her arraignment;

(2) The non-appearance after arraignment of counsel the court promised to appoint but did not appoint to represent her at the trial of the case; and

(3) Erroneous and misleading advice given petitioner by F. B. I. agent Collard as to her legal rights.

(d) Petitioner was coerced, deceived and intimidated by F. B. I. agents into waiving her right to counsel and pleading guilty in that

(1) She was falsely advised by one of the agents that all other defendants in the case would shortly plead guilty;

(2) She was informed by an F. B. I. agent that if she was the only one not pleading guilty, the United

States District Attorney would have to decide whether or not she could have a trial;

(3) She was permitted to understand that unless she pleaded guilty, her husband might be implicated in the case.

(e) Petitioner did not understand and was not advised concerning the nature or consequences of the "waiver" she signed as

(1) The waiver itself is illegible in important parts including the title;

(2) Petitioner understood that the waiver meant that she would have to appear for trial and only signed it after being assured by the Assistant United States Attorney that it was just a matter of form.

ARGUMENT

PETITIONER DID NOT COMPETENTLY AND VALIDLY WAIVE HER CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL FOR THE FOLLOWING REASONS:

(a) In the light of petitioner's background and experience and the complexity of the charge brought against her, petitioner without the assistance of counsel was incapable of understanding and properly evaluating the proceeding in which she was involved and intelligently and competently waiving her constitutional right to assistance to counsel.

Amendment VI to the Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense."

The importance of counsel to an accused in a criminal prosecution was forcefully stated in *Powell v. Alabama*, 287 U. S. at page 69, as follows:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise unadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." (Italics added.)

Equally vital to an accused is assistance of counsel in connection with a plea of guilty, as was pointed out by Mr. Justice Douglas in *Williams v. Kaiser*, 323 U. S. at page 475, referring to the above-quoted language:

> "Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and forecloses any possibility of establishing innocence * * * Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate: A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

See also *Johnson v. Zerbst*, 304 U. S. at pages 462, 463 for similar observations.

It is conceded here, as it was in the District Court and in the Circuit Court of Appeals, that an accused may waive his constitutional right to have the assistance of counsel. *Adams v. U. S.*, 317 U. S. 269. To be valid, however, such waiver must be made freely, understandingly and with full knowledge of one's right to assistance of counsel. *Adams v. U. S., supra; Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, 312 U. S. 275.

Tests to determine the validity of such waivers have been laid down by this Court. In *Adams v. U. S., supra*, it is said:

> "The question in each case is whether the accused was competent to exercise an intelligent, informed judgment and for determination of this question it

> is of course relevant whether he had the assistance of counsel."

The question posed is ordinarily a question of fact and, as was said in *Johnson v. Zerbst, supra:*

> "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, *including the background, experience, and conduct of the accused.*" (Italics added.)

Certainly the determination of whether there has been a valid waiver does not depend upon the observance of certain conventional formalities of procedure nor blindly and mechanically following "delusively simple rules of trial procedure." *Adams v. U. S.*, 317 U. S. at pp. 276, 277; *Ex parte D'Elia*, 51 F. Supp. 542.

Petitioner's Background and Experience

Petitioner came to the United States with her husband from Germany in 1927 (R. 70). They moved to Detroit, Michigan in 1930 (R. 48). Her husband became a naturalized citizen and was an instructor in German at Wayne University at the time of petitioner's arrest (R. 48). She is the mother of three American-born sons (R. 59) the youngest of whom is ill with diabetes and requires two injections of insulin daily and a strictly supervised diet (R. 48). Prior to her arrest petitioner kept house for her husband and two sons and looked after the younger one who is diabetic constantly (R. 48, 58).

Petitioner knew no English when she arrived in this country. Her opportunities to learn English were limited because of her household duties and she spoke only German at home (R. 70). She testified that her knowledge of

English at the time of her arrest was imperfect and that she learned most of it through reading and listening to the radio (R. 69-71). She testified that she thinks in German and translates into English (R. 71). At the time of the habeas corpus hearing in the District Court, petitioner had been in custody about 31 months during which time she had improved her English and had learned a great deal about the language (R. 71). Prior to her arrest she had never been involved in court proceedings (R. 48) and she was not familiar with legal terminology (R. 85). Her only activities outside her home were voluntary work done for the American Red Cross, social work at Y. W. C. A., helping with gas rationing, membership in the Parent-Teacher Association and assisting with mentally deranged people at a nearby state hospital (R. 88, 89). Because of her sick child, however, she was not able to devote much time to the activities mentioned (R. 89). She belonged to no political organizations or clubs (R. 90).

Neither petitioner nor her husband had any funds or property with which to retain and pay an attorney (R. 51, 167, 168). Shortly following petitioner's arrest, her husband lost his position as instructor at Wayne University and obtained a job at $35.00 a week (R. 168).

Nature of Charge

The indictment in which petitioner is named as a defendant is a lengthy one (R. 20-34) involving eight defendants and sixteen named co-conspirators. Forty-seven overt acts are set forth of which only five (R. 29-31: XXIV, XXIX, XXX, XXXI, XXXII) name petitioner. Four of them charge that petitioner met and conferred with one or more of the other defendants on designated dates and the other charged that on a specific date petitioner introduced one of the defendants to another, all "in pursuance of said con-

spiracy and to effect the object thereof." The indictment charges conspiracy to violate Section 32, Title 50, U. S. C. A. (unlawfully disclosing information affecting National defense).

* * * * *

Early during the hearing on the writ of habeas corpus, the District Judge concluded that petitioner was a very intelligent woman (R. 49) and the majority opinion of the Circuit Court of Appeals states that the record shows her to be extremely intelligent with a remarkable command of the English language for a foreign-born person (R. 183).

Petitioner's background and experience do not seem to support these conclusions. While many examples of petitioner's language difficulties were eliminated by reducing portions of the transcript to narrative form, a mere scanning of the record demonstrates, it is believed, that petitioner had considerable difficulty making herself understood (e. g., R. 50, 54, 65, 66, 67, 69, 70, 71, 76, 80, 81, 82). While the degree of her intelligence cannot be determined with any great accuracy from the record, it is clear that her experience did not encompass legal proceedings. Nor is the finding of intelligence consistent with the incontrovertible fact that petitioner is presently in custody on a plea of guilty to a charge which she was incapable of understanding and which was never explained to her by counsel assigned to assist her. Unless it is assumed that there exists an all-encompassing intelligence transcending human experience, it is difficult if not impossible to reach the conclusion upon this record that petitioner was intelligent with respect to the events beginning with her arrest. On the contrary, petitioner exhibited an almost total inability to comprehend and properly react to forces and events which finally culminated, almost inexorably so far as she was concerned, in self-conviction and imprisonment. It is sub-

mitted that petitioner's background and experience did not qualify her alone to cope with the overwhelming problems that confronted her following her arrest when she was suddenly transported from the quiet routine of her family duties into a strange and terrifying world in which a new and unfamiliar language was spoken and she was subjected to such experiences as prolonged interrogations by trained criminal investigators, a night hearing before an Enemy Alien Hearing Board, a 17-page indictment couched in legal language, an arraignment during which she and another woman defendant held a short whispered conversation with an attorney they had never seen before and on his advice "stood mute," the long wait for the attorney the court had promised to appoint for her—the attorney that never came—the disheartening "legal" advice and information given her by an agent of the F. B. I. which overpowered her will to resist and convinced her that her case was hopeless and that there was no alternative but to plead guilty, and the final nightmare of signing a partially illegible mimeographed form (which she thought was a paper requiring her to appear for trial whenever she was wanted) and pleading guilty, followed, as an anticlimax, by prolonged but unsuccessful efforts to withdraw the plea and have a trial.

A good example of petitioner's confusion and inability to understand the nature of the charges brought against her was her repeated denial that she had even been in Grosse Pointe (a suburb of Detroit) as stated in overt act XXXI (R. 31), and that therefore she was not guilty (R. 63, 65, 68). Apparently this puzzled the District Judge as he questioned her on the point as follows (R. 68, 69):

> "Q. (By Mr. Kronner): Did you know, Mrs. von Moltke, what the charges against you were, from a reading of the indictment?
>
> A. You mean what the accusation was?

Q. Yes.

A. I knew I had never been in Grosse Pointe.

Mr. Fordell: That is not responsive to the question.

The Court: When you refer to that fact—you knew you were not in Grosse Pointe—why did you say that, why did you give that answer?

The Witness: Because what I read in the accusations, I felt I was not guilty of it, and I talked this over with Mr. Collard,[1] because Mr. Collard took my statement, and he knew that I had told the truth and that I was not guilty of the 'over' acts."

Further confusion on the part of petitioner as to the charges is illustrated by the following (R. 77, 78):

"Q. (By Mr. Kronner): Now, then, Mrs. von Moltke, how did Mr. Collard[1] explain to you as to the nature of these charges? Did he attempt to explain just what these charges did mean?

A. No, Mr. Collard said that those charges don't mean a thing, and then he explained to make me see the Rum Runners' case.[2] I told him, 'Mr. Collard, you know I never introduced Mr. Abt to Mrs. Dennen (Dineen).'[3]

Then he explained the Rum Runners' case and it gave me the idea that if such is the law in the United States, you can't do anything about it."

This Court has recognized the difficulties confronting a defendant charged with conspiracy. In *Glasser v. U. S.*, 315 U. S. at page 76, it is stated:

"In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly

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[1] of the F. B. I.

[2] See R. 55.

[3] See overt act XXX, R. 30.

> against an individual defendant, it is especially importan tthat he be given the benefit of the undivided assistance of counsel without the court's becoming a party to encumbering that assistance."

The foregoing language was used with reference to Glasser, a United States District Attorney with four years experience in criminal cases. Manifestly these observations would apply with added force to petitioner who was wholly inexperienced in legal matters. Even intellectual brilliance would not qualify a layman to cope with the intricacies of a criminal indictment grounded on conspiracy. *Adams v. U. S.*, 317 U. S. 269.

Admittedly a conspiracy is not easy to define.

> "It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offense of conspiracy; a difficulty resulting in a large measure from the fact that the law on the subject of conspiracy, except where settled by legislative enactment, is beyond certain limits, in a very uncertain state; the cases beyond such limits which have been adjudged to be conspiracy, appear, it has been said, 'to stand apart by themselves' and to be 'devoid of that analogy to each other which would render them susceptible to classification.'" *12 C. J.* 640. See also *11 Am. Jur.* 543.

The advice given petitioner by F. B. I. agent Collard as to what constituted a conspiracy was clearly erroneous as passive cognizance of a contemplated crime or unlawful act or mere negative acquiescence is not sufficient to make one guilty of conspiracy. *11 Am. Jur.* 544.

The truth is that lawyers and even judges sometimes have great difficulty in determining what constitutes a conspiracy. *Gebardi v. U. S.*, 287 U. S. 112; *U. S. v. Falcone*, 311 U. S. 205; *Hartzel v. U. S.*, 322 U. S. 680.

The contention that petitioner, being an intelligent woman, easily could have decided for herself whether or not she was guilty of the charges contained in the voluminous indictment is, it is believed, both unwarranted and naive. The assumption upon which the contention rests is that guilt or innocence can be determined by the simple process of "searching one's conscience," thus ascribing to that abstraction labeled conscience (which some psychologists claim is a mere residuum of childhood inhibitions and feelings of guilt) power to deal with problems arising outside one's experience. If this were true, the constitutional guarantee of assistance of counsel would be unnecessary and the observations of this Court upon the inability of laymen to cope with the intricacies of criminal procedure, superfluous. The cold truth of the matter is that determination of guilt and innocence is one of the knottiest and most difficult processes in the administration of justice.

A case in point is *U. S. v. Heine*, 151 F. (2d) 813, C. C. A. 2, in which it was held that the act of a German-born American citizen in collecting, assembling and transmitting to Germany information concerning U. S. aircraft production from sources accessible to anyone in the U. S. did not constitute a violation of the espionage act (Section 32, Title 50, U. S. C. A.). See also *Hartzel v. U. S.*, 322 U. S. 680.

In the light, therefore, of petitioner's background and experience and the complicated nature of the charges brought against her, it is idle to say that she was competent to comprehend the nature of the charges and to make an intelligent determination of her guilt or innocence without the assistance of counsel. *Glasser v. U. S., supra; Johnson v. Zerbst, supra.*

(b) Petitioner was given conflicting and confusing advice as to her right to be represented by counsel.

When petitioner was first taken into custody, she was told by one of the F. B. I. agents that as an enemy alien she was not entitled to be represented by an attorney (R. 50) and at the immigration detention home she was told by an immigration officer that she was not allowed to have counsel before the Enemy Alien Hearing Board but that friends or relatives were permitted to attend the hearing (R. 50). Petitioner was not aware of the fact that the conspiracy case was a different case from the enemy alien proceeding (R. 170) and no one explained to her at the time she was handed the indictment that thenceforth she was entitled to counsel (R. 51). It is true F. B. I. agent Collard testified that on October 2, 1943 (five days before petitioner pleaded guilty) he explained to petitioner that technically she had been rearrested on the indictment (R. 141) but he did not testify and there is no claim that he or anyone else explained or pointed out to her that she was entitled to have the assistance of counsel after she had been indicted. Manifestly informing petitioner that she had been "technically rearrested on the indictment" without further explanation could not have enlightened her as to her right to assistance of counsel. Rather, such a statement would only serve to add more confusion to an already baffling situation. The record shows that petitioner was informed by the court at the time of her arraignment that she was entitled to counsel (R. 51) but this was followed by a wholly inadequate and disillusioning example of legal representation at the arraignment and the subsequent nonappearance of counsel promised her by the court.

Assistant U. S. Attorney Babcock admitted that he did not point out to petitioner that there was a difference between the proceedings initiated by her arrest on presiden-

tial warrant and those following the indictment (R. 164, 165), though he questioned her at the hearing before the Enemy Alien Hearing Board, conferred with her before she pleaded guilty (R. 58, 158) and appeared with her before the court when the plea was made (R. 65, 66, 67).

It is not anticipated that the Government will contend that petitioner was afforded the assistance of counsel contemplated by the VI Amendment, but will rely upon a claim of waiver. It is submitted, however, that the Government's failure to provide petitioner with effective assistance of counsel at her arraignment, the failure thereafter to appoint counsel to represent her at the trial as promised and the erroneous and misleading information given her by F. B. I. agents Collard and Kirby must be given great weight in considering petitioner's subsequent "waiver" of counsel. Had petitioner been given effective continuous and proper representation beginning with her arraignment, it is reasonable to assume that the series of misadventures culminating in her plea of guilty would have been checked and prevented. As was said in *Glasser v. U. S.*, *supra*:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

(c) Petitioner was misled and confused as to her rights by

(1) Wholly inadequate "assistance" of counsel at her arraignment;

(2) The nonappearance after arraignment of counsel the court promised to appoint but did not appoint to represent her at the trial of the case;

(3) Erroneous and misleading advice given petitioner as to her legal rights by F. B. I. Agent Collard.

(1) and (2):

It is clear under the rulings of this Court that petitioner was entitled to the undivided, continuous and effective assistance of counsel at every step of the proceeedings unless she waived it. *Glasser v. U. S., supra; Hawk v. Olson,* 326 U. S. 271; *Powell v. Alabama,* 287 U. S. 69.

Admittedly the attorney who reluctantly appeared both for petitioner and another woman defendant *for the arraignment only* did not give petitioner undivided, continuous or effective assistance. He did not see the indictment or discuss the charges. His only advice to petitioner was to stand mute. Such offhand and insubstantial services made a mockery of the assistance of counsel guaranteed by the VI Amendment. The nonappearance thereafter of counsel promised by the court gave petitioner added reason to believe that her case was so hopeless that no attorney would represent her (R. 57) and that it would be futile for her to try to prove her innocence (R. 75, 76).

(3) Erroneous and misleading advice given petitioner by F. B. I. agent Collard as to her legal rights.

After petitioner's arraignment, she was taken to the county jail (R. 53). Petitioner waited for the attorney the court had promised to appoint for her to appear (R. 57) but no attorney came and she appealed to various F. B. I. agents who visited her at the jail as to what she should do (R. 63, 96, 122, 134). Agent Collard, who had practiced law before joining the F. B. I., testified that he talked with petitioner at the jail on October 2 and 4, 1943, a few days before she pleaded guilty (R. 137, 138). He admitted conferring with her several hours in the jail matron's office during which he "explained" the indictment to her (R. 140) and attempted to explain the nature of a conspiracy (R. 142). He heard petitioner's testimony as to this conference and admitted that her version was probably correct (R. 142). Petitioner's testimony on the conference was as follows (R. 55):

> "Q. Now then, will you tell the conversation you had with Mr. Collard?
>
> A. I brought my indictment to the office, and assured Mr. Collard it was—I told Mr. Collard that he has taken my statement and he knew that I never was—I didn't do those things which are called 'Over' acts, and Mr. Collard explained to me that the indictment doesn't cover the charge, and I seemed not to be able to understand, so Mr. Collard explained the indictment to me by an example which he called the 'Rum Runners.'
>
> Q. Tell how he advised you and what he said.
>
> A. This is what I understood: That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out,

in the law the man who was present becomes * * * the person nevertheless is guilty of conspiracy. And I said to Mr. Collard: 'If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?' Mr. Collard then told be about the Probation Department, of which I had not heard before, and he explained to me that it is the duty of this office—the Probation Department—to collect the proper data and to present it to the judge, so that the judge will know what to go by."

Collard testified as follows on cross examination (R. 144):

"Q. And did you explain to Mrs. von Moltke the nature of an Overt Act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible."

The foregoing shows beyond question that petitoner was misled and deceived by Collard as to her legal rights and her testimony clearly demonstrates that the erroneous advice and explanations given by Collard greatly influenced her subsequent thoughts and actions and counted heavily in her determination to plead guilty (R. 55, 75).

With counsel to assist and guide her, the situation probably would have been different. As was forcefully stated by Mr. Justice Black in *Johnson v. Zerbst*, 304 U. S. at pages 462, 463:

"It (the VIth Amendment) embodies a realistic recognition of the obvious truth that the average de-

fendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious."

(d) Petitioner was coerced, deceived and intimidated by F. B. I. agents into waiving her right to counsel and pleading guilty in that

(1) she was falsely advised by one of the agents that all other defendants in the case would shortly plead guilty;

(2) she was informed by an F. B. I. agent that if she was the only one not pleading guilty, the United States District Attorney would have to decide whether or not she could have a trial.

In presenting the points of fact and argument under this heading, counsel for petitioner recognizes that the Federal Bureau of Investigation is an essential law enforcement agency, that its methods of operation and policies have received wide public approval, and that its personnel is made up largely of sincere, able and well-trained men. However, it by no means follows that the Federal Bureau of Investigation cannot make mistakes in individual cases and no unwarranted generalization to the contrary should be permitted to close the door to inquiry into particular instances of wrongdoing.

F. B. I. agent Kirby visited and talked with petitioner at the county jail on a number of occasions after her arraignment and before she pleaded guilty (R. 134). On one of these visits he told petitioner that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case would plead guilty the following week (R. 85). F. B. I. agent Kirby did not deny this

but testified that he did not recall making this statement (R. 134). However, he partially confirmed petitioner's testimony on this point as follows (R. 134):

> "Q. And did she (petitioner) ask you that if all the other defendants pleaded guilty whether she would have a right to a trial?
>
> A. I believe she did ask me that question on one occasion.
>
> Q. And did you answer that question?
>
> A. To the best of my recollection, my answer was that the question of trial would be up to the United States Attorney's Office."

The fact is that all other defendants did not plead guilty. *Thomas v. U. S.*, 151 F. (2d) 183. However, the effect of these suggestions upon petitioner could not have been other than injurious. Petitioner had no reason to doubt the statements made to her by Federal law enforcement officers and no means of verifying them through consultation with counsel. They served, therefore, to increase her sense of helplessness and despair to a point where resistance ceased and blind acceptance of what appeared to be inevitable followed.

(3) She was permitted to understand that unless she pleaded guilty, her husband might be implicated in the case.

Prior to her arrest, petitioner took care of her diabetic son constantly (R. 48). After the arrest her husband looked after the boy (R. 49) who finally some three months later, with the assistance of F. B. I. agent Dunham, was placed in a home (R. 57). In the interim he was taken care of in the home of friends of petitioner and her husband, but because it was a complicated case they did not wish to continue to care for him (R. 57, 149, 150). A few days after petitioner's arrest, her husband lost his position at

Wayne University (R. 150) and obtained a job at $35.00 a week, which represented a sharp decrease in his income (R. 168). Petitioner was greatly concerned about the boy and when she heard that unless she pleaded guilty her husband might be implicated she became alarmed and asked permission to speak to F. B. I. agent Collard (R. 54). When he arrived, she told him what she had heard and asked him whether there was any truth in the statement that her husband might be implicated in the case unless she pleaded guilty (R. 61). He told her that he could not answer her question. Petitioner interpreted this as meaning that there was some truth in the statement (R. 62). Greatly troubled, confused and desperate (R. 64) and fearful that there would be no one to look after her diabetic son, petitioner decided to plead guilty (R. 63). She announced her decision to F. B. I. agents Hanaway and Collard and was immediately taken before a Federal Judge and pleaded guilty (R. 66, 67).

Any attorney would undoubtedly have been able to quiet petitioner's fears by pointing out to her that her husband's implication or nonimplication in the case would not depend upon whether she pleaded guilty or not. But "That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious."[1] Unadvised and under circumstances of extreme emotional stress, petitioner was unable to reach any other conclusion than that there was nothing she could do except plead guilty. Obviously at this point, petitioner stood in great need of the assistance of counsel contemplated by the VIth Amendment.

The representations made to petitioner by F. B. I. agents that all other defendants in the case would shortly

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[1] *Johnson v. Zerbst, supra.*

plead guilty; that if she was the only one not pleading guilty she might or might not be allowed to have a trial depending, not on her constitutional right, but on the will of the United States District Attorney; and the conduct of F. B. I. agent Collard in permitting petitioner erroneously to conclude that unless she pleaded guilty her husband might be involved in the case, constituted coercion, deception and intimidation vitiating her conviction and sentence. The Vth Amendment provides that no person shall be "deprived of life, liberty or property, without due process of law * * *." It has been decided by this Court that a conviction on a plea of guilty coerced by Federal law enforcement officers is no more consistent with due process than a conviction supported by a coerced confession. *Waley v. Johnston*, 316 U. S. 101; see also *Walker v. Johnson*, 312 U. S. 275; and see dissenting opinion of Circuit Judge McAllister (R. 189-198).

(e) Petitioner did not understand and was not advised concerning the nature or consequences of the "waiver" she signed as

(1) The waiver itself is illegible in important parts including the title;

(2) Petitioner understood that the waiver meant that she would have to appear for trial and only signed it after being assured by the Assistant United States Attorney that it was just a matter of form.

The waiver signed by petitioner is not conclusive here and the validity thereof is a proper subject of inquiry as a question of fact. *U. S. v. Adams,* 320 U. S. 220; *Adams v. U. S.,* 317 U. S. 269.

There is a presumption against waiver (*Johnston v. Zerbst, supra; Glasser v. U. S., supra)* and a plea of guilty does not *ipso facto* constitute a waiver of right to assistance of counsel, *Rice v. Olson,* 324 U. S. 786.

The following language from *Johnson v. Zerbst, supra,* is illuminating:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' * * * The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

In the *Glasser* case this Court said:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

At the time petitioner pleaded guilty, she was handed a poorly mimeographed form to sign (R. 67, 108, 109, 110). Parts of the form (R. 36) are very difficult to read, particularly the title which, *if it had been properly mimeographed or typewritten*, would have read: "WAIVER OF ASSIGNMENT OF COUNSEL." The body of the instrument reads in part:

> "I, * * * do hereby * * * waive * * * my right to be represented by counsel *at the trial of this cause.*" (Italics added.)

Petitioner's testimony as to signing the waiver was positive. She stated that she tried to read the form and testified (R. 67):

> "Q. To the best of your recollection, do you know what was on that paper?
>
> A. It was something about—to my recollection—that I was to appear for trial whenever I was wanted, and I called Mr. Babcock's[1] attention to that and said I wouldn't sign this note because I did not want a trial. Mr. Babcock said this is all right, I could sign it; and I signed the slip.
>
> Q. Was that, to the best of your recollection, the entire conversation between you and anybody in the courtroom that day about this paper you signed?
>
> A. Yes, sir."

On cross examination she testified (R. 108, 109):

> "Q. And then the Judge asked you whether you wanted an attorney?
>
> A. I do not remember that he asked me that question.
>
> Q. Did he ask you to sign something?
>
> A. No. A note was given to me and I don't know who gave it to me.

[1] Assistant United States Attorney.

Q. Did you sign it?
A. Yes, after I asked Mr. Babcock about it.
Q. Did you read it?
A. I read it.
Q. What do you remember reading?
A. I asked Mr. Babcock what the trial affair means, and Mr. Babock said that it is more or less a—I understood that a matter of form, and he said that it was all right, you can sign this and I signed it."

As a matter of fact the instrument itself (R. 36) lends support to petitioner's understanding that it referred to the trial of her case. Certainly the wording is clear: What is waived is counsel *at the trial.* There is no showing that petitioner waived her right to counsel in connection with her plea of guilty at which time the assistance of counsel is vital. *Williams v. Kaiser, supra.*

This contention is abundantly supported by the record. Petitioner testified on cross examination (R. 103):

"Q. And you husband told you not to plead guilty?
A. He did.
Q. He told you to get a lawyer?
A. Yes; he said I should not before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.
Q. Then you knew at that time that you were entitled to a lawyer before you pled guilty, if you wanted one?
A. I did not. *I just was wondering about the lawyer who never came."* (Italics added.)

Even at the time petitioner pleaded guilty, a question was raised by the court as to the advisability of accepting her plea without an attorney being present (R. 66):

"'Q. Now, then, tell what happened when the Jehovah Witness case was interrupted, and what occurred from there—from that time on?

A. I went in front of Judge Lederle,[1] and Mr. Babcock[2] handed the judge what I would call a folder, and Judge Lederle looked into that, and said he could not accept the change of plead (sic) because there was something about an attorney—either I did not understand what he said—but I understood that he said there was to be appointed an attorney in this case, or there was appointed an attorney in case,[3] or there was to be present an attorney—but I knew distinctly the judge said he could not accept the change of plead, and Mr. Babcock[4] *explained to him that this was different, and that he could accept the change of plead,* and I was handed a note, and it was said to my knowledge and recollection, it was said I was supposed to appear for trial in court and that was what I didn't want at all, so I called Mr. Babcock's attention to that."

Petitioner's testimony as to this incident was confirmed by F. B. I. agent Hanaway (R. 130, 131).

Petitioner's testimony that she did not know about the presumption of innocence or that the Government had the burden of proving guilt is undisputed. About two and one-half months after her plea of guilty she learned for the first time through an attorney that in the United States a person accused of crime does not have to prove his innocence as is the case in some European countries, but that it is the task of the Government to prove guilt (R. 73), information subsequently confirmed by F. B. I. agent Dunham (R. 78). Petitioner was asked whether she would have pleaded

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[1] U. S. District Judge.

[2] Assistant United States Attorney.

[3] See special appearance of counsel for arraignment only: R. 47.

[4] Assistant United States Attorney.

guilty had she known these facts beforehand (R. 73). An objection to this question by the Assistant United States Attorney was sustained. The stated ground of objection was that "the mere fact that she found out later that it *might have been tough* for the Government to prove the case does not establish that she didn't enter her plea intelligently" (R. 74; italics added). It is submitted, however, that a plea of guilty made by one who does not understand the nature of the charges against him or the elements of the offense for which he is indicted or is made under a misapprehension as to some material fact or without knowing or being advised of his constitutional right to counsel is not a free and voluntary admission of guilt or a valid waiver of such right. *Parker v. Johnson*, 29 F. Supp. 829. See also *McDonald v. Johnson*, 62 F. Supp. 830.

* * * * *

Reference is made in the majority opinion of the Circuit Court of Appeals to the fact that two attorneys visited petitioner on one occasion while she was confined in the county jail (R. 183, 194). They went at the request of petitioner's husband (R. 56, 114). One of them (Okrent) was a former student of petitioner's husband at Wayne University (R. 93, 114) and the other (Berger) was a member of a law firm with which Okrent was associated (R. 114). They were told by petitioner's husband that neither he nor petitioner had any funds or property with which to retain or pay counsel (R. 13). The visit was made primarily to ascertain the facts and report thereon to petitioner's husband (R. 116). Mr. Berger told petitioner that he and Okrent were not appearing as her attorneys and *that if she should say anything to them he thought the Government should know about, he would feel free to disclose it* (R. 116). Berger told her he was not there to advise her (R. 120) and

neither attorney did advise her regarding her rights or discuss possible defenses to the charges against her (R. 13, 14, 117). They found petitioner in a highly nervous condition and greatly perturbed about her sick child and her husband (R. 115, 117). Petitioner protested her innocence and inquired whether her husband would get his position back at Wayne University if she pleaded guilty (R. 120). The fact that Berger and Okrent were Jews was considered and discussed as a complicating factor (R. 116). Neither attorney offered to represent her (R. 93, 94). They decided not to take the case and reported their decision to petitioner's husband (R. 14, 119). At this time petitioner was waiting for the attorney the court had promised to appoint for her. She testified (R. 57):

> "Q. Up to that time had any other attorney advised you?
> A. No, sir.
> Q. Were you waiting for an attorney?
> A. I was waiting for an attorney.
> Q. What attorney?
> A. Please?
> Q. What attorney were you waiting for?
> A. The attorney which Judge Moinet was going to appoint for me."

It could scarcely be contended that the single visit of these attorneys who warned her that anything she said might be used against her constituted effective assistance of counsel or is evidence upon which to support a conclusion that petitioner was sufficiently advised of her rights. On the contrary, the fact that the attorneys expressed grave doubts as to whether they would take the case and subsequently decided not to represent her adds substance to petitioner's contention that she was confused, unadvised and misinformed as to her right to assistance of counsel. See *Robinson v. Johnston*, 50 F. Supp. 774.

Some point is made in the majority opinion of Circuit Court of Appeals that petitioner stated on several occasions she did not wish to consult an attorney but wanted to settle the matter herself (R. 185, 186). Petitioner's testimony is to the contrary (R. 85, 96, 103) and even assuming for the purpose of argument that petitioner refused the assistance of counsel, this by no means disposes of the question. *Adams v. U. S., supra.* The test is not whether a particular accused refused the aid of counsel but rather whether he did so freely, competently and knowingly, which necessarily raises involved questions of law and fact. The application of simple tests to intricate problems is likely to yield unjust and inadequate solutions. To conclude that because petitioner refused the aid of counsel she waived her rights in that respect ignores voluminous and persuasive evidence and proofs in conflict with the conclusion reached.

In the majority opinion of the Circuit Court of Appeals the statement is made that petitioner "sent the chief assistant district attorney, through an F. B. I. agent, a proposition to plead guilty * * * if the district attorney's office would agree to" three conditions (R. 186). After petitioner had undergone the experiences set forth above including conflicting advice as to her right to be represented by counsel, perfunctory and offhand representation at her arraignment, the nonappearance of counsel promised by the court, the refusal of two attorneys who interviewed her at the request of her husband to take the case, the gross misinformation given her by F. B. I. agents, and petitioner had concluded that there was nothing else to do but plead guilty, she sought information through an F. B. I. agent (apparently her only contact) as to whether pleading guilty would result in her being deported and if not whether she could be sent to a nearby prison so that she could keep

contact with her family, and whether the publicity would stop (R. 58). Assistant United States Attorney Babcock advised petitioner that if she pleaded guilty it would have to be without conditions (R. 159) and explained that he could not control the press, that her question as to deportation was a matter for the Immigration and Naturalization Service to decide, and that he had no control over the designation of a prison but would, if she requested, write a letter of recommendation that her place of incarceration be near Detroit where her family might see her (R. 159). There is no claim that petitioner tried to obtain any assurance concerning the nature of the sentence that might be imposed. The implication that she callously tried to make a "deal" finds no support in the record. The forces which finally impelled petitioner to plead guilty were already so overwhelming that notwithstanding her failure to obtain any assurances whatsoever as to the three matters mentioned, she nevertheless pleaded guilty. The point not to be overlooked, however, is that petitioner was not advised on the questions she raised by counsel assigned to assist her but by an Assistant United States Attorney who was in charge of the case for the Government. Similarly, her questions regarding the nature of the charges against her and her legal rights were answered, albeit erroneously, by F. B. I. agent Collard who had originally arrested and interrogated her.

A point is made in the majority opinion of the Circuit Court of Appeals (R. 186) that petitioner was advised by one judge that she was entitled to have an attorney appointed for her by the court and that a second judge asked her specifically whether she wished to be represented by counsel. While it is true that the judge who presided at her arraignment told her that he would appoint counsel to represent her at the trial, he failed to do so and petitioner waited in vain for one to appear. As to being interrogated

by the second judge, it may be conceded that routine questions were put to petitioner concerning her right to counsel, etc., but it must be remembered that this occurred after petitioner had been conditioned into a state of abject acquiescence by unlawful acts she charges violated her constitutional rights.

It is stated in said majority opinion that petitioner's counsel emphasized the harshness of the ten-day rule then limiting the time for making a motion to withdraw a plea of guilty (R. 188: 18 U. S. C. following Section 688). The point was not raised or argued in the District Court or briefed in the Circuit Court of Appeals for the reason that it was not considered material to the issues presented in the habeas corpus proceeding. The question, as pointed out in the dissenting opinion (R. 197), was not whether petitioner should have been allowed to withdraw her plea but whether under the evidence and proofs her conviction and sentence were void because she had been deprived of her constitutional rights. See, however, *Canizio v. People*, 327 U. S. 82.

It is stated in said majority opinion (R. 184) that petitioner's own testimony contradicts her statement that she did not understand the charge. On cross-examination petitioner admitted that she had read the indictment and that she felt she was innocent of the charges (R. 90, 91). From this it is argued that petitioner must have known what the charges were, but it is submitted that the conclusion contended for is a *nonsequitur*. The key word in the question was the word "innocence" and what petitioner obviously was attempting to do was to protest her innocence. She was easily tricked into overlooking that part of the question which implied knowledge of the nature of the charges and eagerly answering that part that gave her an opportunity to assert her innocence and deny guilt. Her subse-

quent answers quoted on page 185 of the record show clearly that petitioner was thinking only of the overt acts. A somewhat similar incident occurred on petitioner's direct examination (R. 75, 76) as follows:

> "Q. (By Mr. Kronner): Will you tell the conversation between Mr. Collard[1] and you on the occasion when he went over and read the indictment to you: tell everything you heard that was said.
>
> A. I read the indictment and I took it to the office. I told Mr. Collard, I said, 'Say, Mr. Collard, you know I have nothing to do with all the people named here.' And then he pointed out what he called the 'Over' Acts, and I said, 'You know from my statement I am not guilty of all this.'
>
> The Court: —not guilty of all this?
>
> The Witness: Yes.
>
> The Court: *But you were guilty of some of the Overt Acts, weren't you?*
>
> The Witness: No, your Honor.
>
> The Court: I just glanced over here—Act 24, you are mentioned in it, and I saw one or two other places where you are mentioned. I never read this indictment before, but I know at least two places—24, 32—
>
> Mr. Fordell: 29, 30—
>
> The Court: Yes, I know there are a number in which you are mentioned. Did you notice you were mentioned in several of these Overt Acts charged?
>
> The Witness: Yes.
>
> The Court: All right, because you just referred specifically to one which describes something that occurred in Grosse Pointe; you said you weren't there; but there were quite a number of other Overt Acts charged in which your name was mentioned—that is true, isn't it?
>
> The Witness: That my name was listed. But I am not guilty of it, and this is what I talked to Mr.

[1] of the F. B. I.

Collard about, because, I said, 'You have taken my statement, and you know it is not so.' "

The following language from *William v. Kaiser, supra,* seems especially apropos here:

> "He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

CONCLUSION

Upon this record and under the applicable law as expounded by this Court and the provisions of the Vth and VIth Amendments to the Constitution, it is earnestly contended that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

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